A

LEXTREND SDN BHD & ORS v. SOTELLA FUND PTE LTD

COURT OF APPEAL, PUTRAJAYA
COLLIN LAWRENCE SEQUERAH JCA
AZHAHARI KAMAL RAMLI JCA
MUNIANDY KANNYAPPAN J

B

[CIVIL APPEAL NO: W-02(NCvC)(A)-433-03-2024]
26 NOVEMBER 2025

Abstract – *(i) Where multiple agreements form part of a single, cohesive commercial transaction, they must be interpreted as an inextricable nexus. Consequently, liability under secondary security documents is contingent upon the crystallisation of obligations under the principal agreements. If the primary obligation has not been breached, the security cannot be enforced; (ii) When parties have agreed to a valid arbitration clause, the court should not adjudicate substantive disputes that fall within the scope of that clause. Initiating concurrent court proceedings for the same relief sought in arbitration constitutes a substantial overlap and a multiplicity of proceedings.*

C

D

E

CONTRACT: *Agreements – Interrelated agreements – Construction – Share subscription agreement, memorandum of deposit and deed of undertaking – Whether agreements formed part of single cohesive commercial transaction – Whether liability under memorandum of deposit and deed of undertaking contingent upon enforceability and breach of principal agreements*

F

COMPANY LAW: *Shares – Redeemable preference shares – Redemption of – Failure to redeem – Requirement of available distributable profits – Whether redemption obligations crystallised – Whether failure to prove profits meant no breach of principal agreements – Companies Act 2016, s. 72(4)*

G

MONEYLENDERS: *Illegal moneylending – Enforceability – Commercial transaction governed by share subscription agreement, memorandum of deposit and deed of undertaking – Interests charged – Whether transaction constituted moneylending business – Whether agreement void ab initio – Whether anti-illegality clauses could cure or insulate illegal transaction – Moneylenders Act 1951, s. 15*

H

EVIDENCE: *Admission – Liability – Failure to respond to letters of demand – Whether silence or non-response equated to admission of breach or claim*

I

The respondent was a company incorporated in Singapore while the appellants were companies incorporated in Malaysia. The second and third appellants owned 40% and 60% equity, respectively, in the first appellant. The fourth appellant was the registered proprietor of four parcels of freehold land ('BSA land') in Johor which were pledged as third-party security for the

due repayment of the monies to the respondent, pursuant to cl. 9 of the share subscription agreement ('SSA'). By way of an SSA, the respondent subscribed to redeemable preference shares ('RPS') in the first appellant. Shortly after the execution, the SSA was varied by a letter of agreement and further varied by a supplemental agreement ('SA') ('principal agreements'). A memorandum of deposit ('MOD') was executed between the respondent and the four appellants. By the MOD, the BSA land was pledged as security for the principal agreements. A deed of undertaking ('DOU') and indemnity were executed between the respondent and the second and third appellants. Dispute arose when the first appellant allegedly breached and/or defaulted in the principal agreements for failing to redeem and pay the redemption sums for its RPS. The respondent initiated various legal proceedings, *ie*, arbitration proceedings, writ proceedings and originating summons ('OS') proceedings, to seek redress in relation to the first appellant's defaults. The High Court, in the OS proceedings, found the appellants liable and ordered specific performance of the MOD, the DOU and indemnity and a mandatory injunction for the transfer of the BSA land to the respondent. Hence, the present appeal. The issues that arose were: (i) whether liability under the MOD and the DOU was contingent upon the enforceability of the principal agreements; (ii) whether the redemption obligations had crystallised; (iii) whether there were multiplicity and overlap of proceedings; (iv) whether the SSA was a moneylending transaction; and (v) whether the appellants had admitted liability.

Held (allowing appeal with costs)
Per Collin Lawrence Sequerah JCA delivering the judgment of the court:

(1) There was an inextricable nexus between the MOD, the DOU and the principal agreements. The MOD and the DOU constituted contingent securities designed to secure obligations arising from the principal agreements and they were triggered only upon the occurrence of a redemption default which was a condition that remained unsatisfied. The High Court erred in law and/or fact by failing to appreciate the inherent connection between the MOD, the DOU and the principal agreements as part of the same commercial transaction along with the contingent nature of the MOD and the DOU in relation to the principal agreements, the requirement to interpret these agreements as part of a cohesive commercial transaction and the legal principles governing the interpretation of interrelated contracts and their application to the present case. (paras 46, 48 & 54)

(2) As there was no evidence of available distributable profits at the material time, there were no present and owing obligations towards the respondent under the principal agreements and thus, there could be none under the MOD and/or the DOU. Further, the respondent had not alleged that the appellants' operations were profitable or that there was

A a surplus of cash available for the redemption of preference shares. As the redemption obligations under s. 72(4) of the Companies Act 2016 had not crystallised, the first appellant was therefore not in breach and consequently, there were no corresponding obligations that existed under the MOD/and or the DOU. (paras 71-73)

B **(3)** The respondent had initiated arbitration proceedings as well as writ proceedings, apart from the current OS proceedings, against the appellants. The disputes between the parties here comprised the very same subject matter of, at the time, ongoing arbitration proceedings pursuant to cl. 30 of the SSA, encompassing alleged defaults of the first C appellant's obligation to redeem the RPS. The courts ought not to adjudicate the substantive disputes covered by a valid arbitration clause. There were a substantial overlap and a multiplicity of proceedings in that they all sought for a common relief. (paras 74-77)

(4) Certain clauses in the SSA, the DOU and the MOD raised red flags with D regard to the legitimacy of these transactions and were clearly admissions of the illegality of the SSA, the DOU and the MOD. The transaction was not saved by the First Schedule to the Moneylenders Act 1951 ('MLA') and was unenforceable under s. 15 of the MLA. The unenforceability was further not cured by the inclusion E of the anti-illegality clauses and could not insulate the transaction that was to be struck down as an illegal moneylending transaction. The inevitable results of all this was that the interest charged rendered the agreement void *ab initio* for being forbidden by law and would defeat the clear provisions of the MLA. (paras 112-115)

F **(5)** The respondent had premised its case, *inter alia*, upon the allegation that the first appellant's alleged default of its contractual obligation under the principal agreements was undisputed. The High Court had equated a failure to respond in writing to notices as an admission of breach. However, the first appellant had explicitly disputed the alleged default G in its response to the notice of arbitration. Furthermore, discussions were ongoing between the parties at the same time. Non-response to a demand letter may be weighed against the overall evidence but a failure to respond must not be equated to admission of a claim. The High Court had, therefore, erred in adopting the position that there was an H admission by the first appellant. (paras 118 & 120-123)

Case(s) referred to:

Prenn v. Simmonds [1971] 3 All ER 237 ***(refd)***

Reardon Smith Line Ltd v. Hansen-Tangen [1976] 3 All ER 570 ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

I *Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt [2016] 9 CLJ 73 CA* ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***
Triple Zest Trading & Suppliers & Ors v. Applied Business Technologies Sdn Bhd [2023] 10 CLJ 187 FC ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 72(4), 588(1)
Contracts Act 1950, s. 33(a)
Moneylenders Act 1951, ss. 2, 10OA, 15, 17A(1), (2), First Schedule

For the 1st-3rd appellants - M Pathmanathan, Rutheran Sivagnanam & Shirin Pathmanathan; M/s R Sivagnanam & Assocs
For the 4th appellant - Cyrus Das & Teh Wen Miin; M/s R Sivagnanam & Assocs
For the respondent - Cecil Abraham, Sunil Abraham, Muzalifah Shabudin, Chia Eng Yi & Tan Shwu Jen; M/s Cecil Abraham & Partners

[Editor's note: For the High Court judgment, please see Sotella Fund Pte Ltd v. Lextrend Sdn Bhd & Ors [2024] CLJU 2241 (overruled).]

Reported by Najib Tamby

JUDGMENT

Collin Lawrence Sequerah JCA:

Introduction

[1] This is an appeal by the appellants against the decision of the High Court dated 8 February 2024 which found that the appellants were liable as claimed by the respondent in originating summons WA-24NCvC-1182-03-2024 dated 10 March 2023 ("OS") and which ordered, *inter alia*, specific performance of a memorandum of deposit and a deed of undertaking and indemnity, both dated 21 December 2016, and a mandatory injunction for the transfer of lands called the 'BSA land' to the respondent or the respondent's appointed nominee.

Background Facts

[2] Sotella ("respondent") is a company incorporated in Singapore. All four appellants are companies incorporated in Malaysia,

[3] The first appellant holds an approved property developer status by the Ministry of Finance Malaysia and MIDA of the Iskandar Development Region in the state of Johor.

[4] The second and third appellants own 40% and 60% equity respectively in the first appellant.

[5] The fourth appellant is the registered proprietor of four parcels of freehold land ("BSA land") in Johor which were pledged as third-party security for the due repayment of the monies to the respondent pursuant to cl. 9 of a share subscription agreement.

[6] By a share subscription agreement dated 21 December 2016 (SSA), Sotella (respondent) subscribed to redeemable preference shares ("RPS") in Lextrend (first appellant).

[7] Shortly after execution, the SSA was varied by a letter of agreement dated 5 January 2017 ("LA"). This was further varied by supplemental agreement dated 7 September 2021 ("SA"). Collectively, the three documents are referred to as the principal agreements relating to Sotella's RPS investment in Lextrend.

[8] A memorandum of deposit dated 21 December 2016 ("MOD") was executed between Sotella of the one part and Lextrend, Bamboo Quest, UM Land and Seri Alam Properties (four appellants) of the other. By the MOD, as alluded to earlier, the BSA land was essentially pledged as security for the principal agreements.

[9] A deed of undertaking and indemnity dated 21 December 2016 ("DOU") was executed between Sotella of the one part, and Bamboo Quest and UM Land (second and third appellants) of the other.

[10] The pith of the dispute between the parties is that Sotella ("respondent") claims that Lextrend (first appellant) is in breach and/or default of the principal agreements for failing to redeem and pay the redemption sums for its RPS in accordance with the principal agreements (Lextrend's defaults).

[11] Clause 12.1(a) and (d) of the SSA provides, *inter alia*, that if the first appellant breaches its obligation under cl. 9 of the SSA *vis-à-vis* the redemption of the RPS within the stipulated timeline, such a failure shall constitute an event of default.

[12] Clause 9.2 of the SSA provides that the first appellant shall redeem the RPS within the specified timeline, as outlined in the agreement (subsequently amended through the letter agreement dated 5 January 2017 and supplemental agreement dated 7 September 2021).

[13] Clause 9.3 of the SSA states that "each redemption above must be effected on each of the redemption dates stipulated".

[14] The respondent contended that since the first appellant has failed to redeem the plaintiff's RPS and/or make the required payments concerning the unpaid redemption sum under cl. 9.2 of the SSA, as amended by the supplemental agreement and the letter of agreement, this failure constitutes an event of default under cl. 12 of the SSA.

[15] Sotella (respondent) initiated various legal proceedings to seek redress in relation to Lextrend's defaults which are as follows:

(i) arbitration against Lextrend by way of notice of arbitration dated 27 February 2023 in accordance with cl. 30 of the SSA (arbitration proceedings). In the arbitration proceedings, Sotella prays for, among others, declarations that Lextrend is bound by the principal agreements and has defaulted on its payment obligations, payment of the sums due from Lextrend, specific performance under the principal agreements, or, alternatively, an award of damages *in lieu* of specific performance;

(ii) the OS proceedings in OS No. WA-24NCv01182-03-2023 dated 10 March 2023 against Lextrend, Bamboo Quest, UM Land and Seri Alam Properties (the current OS under consideration). In the OS proceedings, Sotella prayed for declarations, specific performance, and mandatory injunctions for the transfer of the BSA land ostensibly pursuant to the MOD and DOU; and

(iii) the writ proceedings issued as Civil Suit No: WA-22NCvC-104-03-2023 also dated 10 March 2023 against Bamboo Quest and UM Land pursuant to the DOU. Sotella prays for, *inter alia,* declarations and payment for the 'unpaid redemption sums', interest and costs. Sotella further filed Suit No: WA-22NCvC-562-10-2023 against Bamboo Quest and UM Land claiming for payment of further 'unpaid redemption sums'. This suit is being tried together with the above writ proceedings.

[16] The current appeal concerns the respondent's claim against the appellants in the OS (1182) dated 10 March 2023 in the KL High Court for various orders sought against the appellants.

[17] On 8 February 2024, the High Court found in favour of the respondent and granted the respondent all the reliefs sought for resulting in the present appeal before us.

Parties Submission

Sotella (The Respondent)

[18] In summary, the respondent submitted that Lextrend (first appellant) has failed and continues to fail to redeem the redeemable preference shares ("RPS") in accordance with the terms of the principal agreements.

[19] The respondent submitted that the first appellant had defaulted its redemption obligation for the tranches due as follows:

(i) on 20 June 2022 – Class A1 RPS for USD13,002,500; and Class A2 RPS for RM46,437,500;

(ii) on 20 December 2022 – Class A1 RPS for USD484,400; and Class A2 RPS for RM2,162,500;

(iii) on 20 June 2023 – Class A1 RPS for USD12,594,400; and

(iv) Class A2 RPS for RM45,412,500.

[20] The respondent submitted that those amounts owing by the first appellant to them excluding interest is referred to as unpaid redemption sum and constituted to be a material and fundamental breach of the principal agreements.

[21] As a result, the second, third and fourth appellants, who are the respective parties to the MOD and/or the deed of undertaking are obliged to comply with the terms and conditions of the said agreements.

[22] The respondent submitted further that the appellants are clearly contract breakers and the parties in breach of their contractual obligations under the MOD and deed of undertaking respectively.

[23] It was also submitted that the first and fourth appellants are in breach of, *inter alia*, cls. 11 and 12 of the said MOD, whilst the second and third appellants are in breach of cls. 2, 3 and 4 of the said DOU, in neglecting to ensure that the fourth appellant, in particular, effects the transfer of the BSA land to the respondent.

[24] The respondent submitted that the appellants do not have a credible and/or any real defence to this action. Sections 72(4) and/or 588 of the Companies Act 2016 is not a defence open to the appellants.

[25] The appellants are also not entitled to attribute their failure to perform their contractual obligations under the MOD and/or the DOU respectively due to the impact of COVID-19 pandemic, as they are not entitled to any statutory protection and in any event, such a defence is not a credible and/or valid defence.

[26] As far as the first appellant is concerned, notwithstanding that it is a party to the principal agreements and/or the SSA, this does not preclude the respondent from pursuing action under the MOD against the first appellant as the said MOD is a separate and independent contract from the principal agreements and/or the SSA.

[27] The respondent submitted that there is no arbitration agreement contained in the MOD and there is no agreement between the respondent and the first, second, third and fourth appellants that any dispute and difference between the parties pertaining to the MOD shall be referred to the arbitration proceedings.

[28] The respondent therefore submitted that it is entitled to the reliefs in the form of a declaratory judgment, specific performance and mandatory injunction in its favour.

The Appellants

[29] The appellants submitted that all claims under the MOD and the DOU are contingent on Lextrend's (first appellant) alleged defaults of principal agreements in pending arbitration proceedings.

[30] The respondent claims that the MOD, the DOU, and the principal agreements are all connected and indivisible. The respondent's claims are premised on Lextrend's alleged defaults which are currently pending determination in the ongoing arbitration proceedings.

[31] The appellants submitted that Lextrend's alleged defaults ought to be determined by the arbitral tribunal. Lextrend's alleged defaults of the principal agreements are a subject of ongoing arbitration pursuant to an arbitration agreement in cl. 30 of the SSA.

[32] The appellants submitted that there are authorities that hold that courts should not adjudicate substantive disputes covered by a valid arbitration agreement.

[33] The appellants contend that under cl. 2 of the MOD, Sotella must first exhaust all rights and remedies under principal agreements. Based on the terms of the MOD itself, Sotella's claims under the principal agreements in arbitration ought to proceed first and the OS proceedings pursuant to the MOD is premature.

[34] The appellants further submitted that the High Court was wrong to conclude on Lextrend's alleged defaults and, at the same time, refuse to consider Lextrend's defences.

[35] They further argued that, having decided to evaluate Lextrend's alleged defaults (despite an ongoing arbitration on the issue), the learned JC totally failed to consider Lextrend's defences that its redemption obligations under the principal agreements must be read with s. 72 of the Companies Act 2016 which governs preference shares.

[36] The appellants submitted that the redemption obligations cannot crystallise until these conditions are met and redemption timelines in the principal agreements can only be indicative.

[37] The appellants argued that construing timelines for Lextrend to redeem the RPS under the principal agreements as 'hard' or 'fixed' timelines with repayment sums at +/-200% of Sotella's initial subscription renders the agreements and transaction tantamount to unenforceable moneylending under the Moneylenders Act 1951.

[38] The appellants relied, *inter alia,* on the case of *Triple Zest Trading & Suppliers & Ors v. Applied Business Technologies Sdn Bhd* [2023] 10 CLJ 187 in support of their argument.

[39] Consequently, they argued that courts ought not to assist an illegality and the construction of the redemption obligations under the principal agreements, if it resulted in non-compliance with ss. 72 and 588(1) of the Companies Act 2016, would taint all the instruments to the transaction, including the MOU and DOU with illegality and ought to be severed.

[40] The appellants contend that the learned JC was wrong in fact and law to equate a failure to respond in writing to notices as an admission of breach and that a lack of written response cannot admit or conclude the issue of liability, particularly when discussions were ongoing between parties at the same time.

[41] They argued that non-response to a demand letter may be weighed against the overall evidence, but the failure to respond must not be equated to admission of a claim.

[42] The appellants submitted that Lextrend (first appellant) had kept Sotella (respondent) notified in good faith and had openly and clearly communicated with Sotella pursuant to good faith obligations in cl. 14 of the SSA.

[43] They said that Sotella was well aware of the challenges and delays to the UMCity project as a result of the COVID-19 pandemic and despite significant disruptions, Lextrend demonstrated a strong commitment to fair and cooperative conduct, actively engaging with Sotella Fund and maintaining transparent communication while seeking viable solutions to address the issues.

[44] The appellants argued that Sotella's investment in Lextrend only requires time to materialise as the UMCity project nears full completion and monetisation.

Analysis And Findings

[45] The issues for determination in this appeal that arise can be described as follows:

(i) was liability under the MOD and the DOU contingent upon the enforceability of the principal agreements;

(ii) had the redemption obligations crystallised;

(iii) were there multiplicity and overlap of proceedings;

(iv) was the share subscription agreement ("SSA") in fact a moneylending transaction; and

(v) did the appellant(s) admit liability.

Was Liability Under The MOD And DOU Contingent Upon The Enforceability Of The Principal Agreements?

[46] A careful reading of the principal agreement, and the MOD and the DOU will show an inextricable nexus between the MOD, the DOU, and the principal agreements.

[47] This is seen particularly by reference to cls. 2 and 11 of the MOD and cl. 2 of the DOU, which predicate their enforceability on defaults under the principal agreements.

[48] The MOD and the DOU constitute contingent securities designed to secure obligations arising from the principal agreements and they are triggered only upon the occurrence of a redemption default which is a condition which remains unsatisfied.

[49] A perusal of the SSA (cl. 9.2) explicitly requires (first appellant) Lextrend to lawfully redeem the preference shares on specified dates and tranches which represents the primary obligation giving rise to any subsequent liability under the MOD and the DOU.

[50] The MOD (cl. 2) explicitly states that the security only activates where Lextrend is "unable to secure the redemption and repayment in full in accordance with the agreement".

[51] It is significant that the MOD itself acknowledges that it is "executed pursuant to and as security for the SSA".

[52] The DOU (cls. 1 to 3) imposes obligations upon the guarantor strictly contingent on "default in a lawful redemption". The recitals of the DOU expressly affirm its concurrent execution by use of the phrases, "in consideration of, and concurrently with, the SSA".

[53] Thus, both MOD and the DOU are inextricably linked to the SSA and specifically conditional upon the existence of a lawful redemption default.

[54] With the greatest of respect, the learned JC erred in law and/or fact by failing to appreciate the inherent connection between the MOD, the DOU, and principal agreements as part of the same commercial transaction along with the contingent nature of the MOD and the DOU in relation to the principal agreements, the requirement to interpret these agreements as part of a cohesive commercial transaction and the legal principles governing the interpretation of interrelated contracts and their application to the present case.

[55] Consequently, the learned JC had erred in law and/or fact by failing to recognise that the respondent's pursuit of remedies under the MOD and the DOU is inextricably linked to and contingent upon the existence of Lextrend's alleged defaults under the principal agreements.

[56] The learned JC erred in holding that the obligations under the MOD and the DOU were independently enforceable, irrespective of the existence of any legally recognised default under the principal agreements or its validity.

[57] There are ample authorities to state that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, against the factual matrix forming the background of the case.

[58] As an example, see *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779.

[59] If further authority is required, it can be discerned from the long-established principle enunciated by Lord Wilberforce in *Prenn v. Simmonds* [1971] 3 All ER 237, that contracts must be construed as against the background of the factual matrix in which they were formed.

[60] See also *Reardon Smith Line Ltd v. Hansen-Tangen* [1976] 3 All ER 570, which held that contracts are to be interpreted according to what is commonly described as "the surrounding circumstances" which in the context of commercial contracts involve knowing the commercial purpose, the background, the context and the market in which the parties are operating.

[61] Further, s. 33(a) of the Contracts Act 1950 provides that a contingent contract is only enforceable when the event upon which it is contingent has occurred.

[62] The contingency in this case is the inability to secure the redemption and repayment under the principal agreements or of the existence to a legally recognised default which has not yet been established.

[63] Although a portion of cl. 2 of the MOD was alluded to above, for present context, the said clause is reproduced in full as follows:

> Notwithstanding any provision to the contrary in the Agreement and/or this MOD, it is understood and agreed by the Investor and the Company that, the enforceability of this MOD shall only arise in the event the Investor is unable to secure the redemption and repayment in full in accordance with the Agreement (other than through the realisation of rights to the Securitized Assets and/or the exercise of the MOD and Deed of Undertaking).

[64] It is also the submission of the appellants in this regard, with which we are in agreement with, that the phrase "(other than through the realisation of rights to the securitised assets and/or the exercise of the MOD and deed of undertaking)" conveys the meaning that Sotella (respondent) must first exhaust all rights and remedies under the principal agreements.

Had The Redemption Obligations Crystallised?

[65] The subscription of the preference shares in the first appellant must be construed based on the principal agreements read with s. 72 of the CA 2016.

[66] In order to supply business efficacy to the agreement, it is necessary to imply a term stipulating that the redemption obligations under the principal agreements are contingent upon the fulfilment of the conditions set out in s. 72(4) of the CA 2016.

[67] The "business efficacy" test is used to determine whether the implied term would give the desired result of the contract between the parties and the question to be asked is whether, without the term, the contract would lack commercial or practical coherence, see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151.

[68] It is also further necessary to imply a term that the enforceability of the MOD and the DOU is contingent upon the crystallisation of redemption obligations under the principal agreements, which in turn is subject to the conditions stipulated in s. 72(4) of the CA 2016.

[69] Section 72 (4) of the Companies Act 2016 reads as follows:

> 72. Preference shares
>
> (1) Subject to its constitution, a company having a share capital may issue preference shares.
>
> (2) ...
>
> (3) ...
>
> (4) Subject to subsections (5) and (6), the shares shall be redeemable only if the shares are fully paid up and the redemption shall be out of:
>
> (a) profits;
>
> (b) a fresh issue of shares; or
>
> (c) capital of the company.

[70] The learned JC had erred in failing to consider that the redemption obligations under the principal agreements had not yet crystallised because the conditions under the sub-section above could not be fulfilled.

[71] As there was no evidence of available distributable profits at the material time, there was thus no present and owing obligations towards Sotella under the principal agreements, and thus there can be none under the MOD and/or the DOU.

[72] Sotella had further not alleged that the appellant's operations are profitable or that there was a surplus of cash available for the redemption of preference shares.

[73] As the redemption obligations under s. 72(4) of the Companies Act 2016 had not crystallised, the first appellant was therefore not in breach and consequently, there were no corresponding obligations that existed under the MOD and/or the DOU.

A *Were There Multiplicity And Overlap Of Proceedings?*

[74] As alluded to earlier, the respondent had initiated arbitration proceedings as well as writ proceedings apart from the current OS proceedings against the appellants.

B **[75]** The disputes between the parties here comprised the very same subject matter of, at the time, ongoing arbitration proceedings pursuant to cl. 30 of the SSA encompassing alleged defaults of the first appellants obligation to redeem the RPS.

[76] The courts ought not adjudicate the substantive disputes covered by a C valid arbitration clause.

[77] There was therefore a substantial overlap and multiplicity of proceedings in that they all sought for a common relief.

Was The Share Subscription Agreement ("SSA") In Fact A Moneylending D *Transaction?*

[78] The SSA obliges the first appellant to pay the full "redemption price" in six predetermined instalments on set calendar dates. These dates apply irrespective of the company's profitability and the company's financial health, as earlier discussed.

E **[79]** This feature points toward a debt-like repayment schedule rather than a genuine equity arrangement dependent on commercial success. The most prominent indicator was the fixed redemption timetable.

[80] The SSA further guarantees Sotella (respondent) a fixed, time-linked F yield of approximately 14.7% per annum payable based entirely upon the passage of time, regardless of Lextrend's (first appellant) business performance.

[81] This feature, while superficially appearing as an equity subscription is in fact a loan bearing interest falling within the prohibition of s. 2 of the G Moneylenders Act 1951 ("MLA 1951").

[82] Yet another peculiar feature here is that the preference shares confer no substantive equity rights and neither carry dividend entitlements nor any meaningful voting rights except in a winding-up situation.

H **[83]** The result is that Sotella (respondent) is therefore insulated from any business risk typically associated with equity investment in a project.

[84] This feature reflected the economic position of a creditor awaiting a fixed return. This absence of risk participation underscores the true nature of the SSA which in reality is a loan transaction but portrayed as an equity I investment.

[85] The investment returns were pre-determined and the sum described as "investment returns" over and above the subscription price was functionally interest and camouflaged to appear otherwise.

[86] The agreement also included a clause for additional interest on each unpaid redemption amount.

[87] Crucially and as alluded to earlier, the appellants were obligated to make payments regardless of company profits, which meant s. 72(4) of the Companies Act 2016, relating to profits available for distribution, could not apply.

[88] When viewed as a whole, the features comprising the fixed repayment schedule, the guaranteed 14.7% per annum yield, the absence of meaningful equity (profit) participation, and the use of conventional loan-type securities strongly indicate that the SSA was in fact a vehicle for an unlicensed moneylending arrangement.

[89] The principal loan amount was USD14 million or RM50 million, in total. Over the contractual period, the total figure to be repaid amounts to USD29,785,000 or RM106,375,000 (the total of the redemption sums).

[90] Thus, the annual yield over the contractual period amounts to approximately 14.7%, exceeding the statutory ceiling of 12% per annum (secured loans). This would render the agreement void.

[91] Section 17A (1) and (2) of MLA 1951 read as follows:

> (1) For the purposes of this Act, the interest for a secured loan shall not exceed twelve per centum per annum and the interest for an unsecured loan shall not exceed eighteen per centum per annum,
>
> (2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a licensee of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees.
>
> (3) Where in a moneylending agreement the interest charged for a secured loan or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.

[92] The redemption sums contemplate over double (200%) the initial investment.

[93] According to the definition of "interest" in s. 2 of the MLA 1951, any amount beyond the principal, paid or payable to a moneylender in consideration of a loan, falls within the purview of interest.

[94] We find ourselves in agreement with the submission of learned counsel for the appellant that the respondent in this case had subscribed to Class A1 and A2 preference shares in two separate tranches and disbursed

its subscription proceeds in multiple disbursements of approximately USD10.2 million and RM49.5 million for Class A1 and A2 in tranche 1 and USD3.8 million and RM500,000 million for Class A1 and A2 in tranche 2.

[95] Learned counsel for the appellant submitted that taking the respondent's characterisation of the redemption schedule as an inflexible and set repayment schedule demanding fixed returns to a cash loan disbursement amounts to unlicensed moneylending. There was no reference to profits or performance of the company.

[96] This state of affairs resulted in the presumption under s. 10OA of the MLA 1951 arising which reads:

> Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.

[97] Therefore, even a single instance of a loan with interest creates a presumption that the lender is conducting the business of moneylending.

[98] Here, when the true transaction is unmasked, it reveals beneath the surface a loan labelled as an equity transaction subscription.

[99] It is not in dispute that Sotella (respondent) is not a licensed moneylender. There was nothing to show that the respondent had rebutted on a balance of probabilities the presumption under s. 10OA of the MLA.

[100] This inadequacy was exacerbated by the fact that being initiated as an originating summons action, as opposed to a writ action at the insistence of the respondent, no *via voce* evidence was forthcoming to rebut the application of the presumption.

[101] The transaction here is not dissimilar to that obtained in the Federal Court case of *Triple Zest Trading & Suppliers & Ors v. Applied Business Technologies Sdn Bhd* (*supra*) where a *de facto* loan transaction with high-interest rate repayments were characterised as follows:

> [41] The "consideration" of RM800,000 payable to the respondent at any time before or at the expiry of the agreement period of 30 days was nothing but "interest" at the rate of 100% disguised as "agreed profit". By whatsoever label it was given, the RM800,000 was "any amount by whatsoever name called in excess of the principal paid or payable to a moneylender". If a rose by any other name would smell as sweet, a corpse flower by any other name would smell as foul.

[102] Like *Triple Zest*, there was a fixed time frame for payments, title deeds were deposited as collateral, personal guarantees were provided and the return of 100% more than the amount lent was termed as "agreed profit".

[103] The label attached to the transaction thus does not matter as substance trumps over form.

[104] Another feature is that cl. 12 of the SSA sets out five events of default which would entitle the respondent to terminate the agreement in accordance with cl. 13.1 of the SSA which is a salient feature of a loan transaction and not of equity participation as equity participation carries with it equity risk and not foolproof returns.

[105] Clause 9.3 of the SSA also allows for additional interest calculated at 8% p.a. accruing on a daily basis on each unpaid redemption amount.

[106] There were also anti-illegality clauses that militated against the legitimacy of these transactions.

[107] Clause 19 of the SSA read:

> 19. ILLEGALITY
>
> 19.1 The illegality, invalidity or enforceability of any provision of this Agreement under the law of any jurisdiction shall not vitiate this Agreement whatsoever or otherwise affect its legality, validity or enforceability under the law of any jurisdiction nor the legality, validity or enforceability of any other provision.
>
> 19.2 The Parties agree and undertake to make all necessary amendments to any provisions found to be illegal, invalid or enforceable pursuant to clause 19.1 so as to render the same legal, valid and enforceable.

[108] Clause 7.1 of the DOU read:

> Clause 7.1 of DOU
>
> The illegality, invalidity or unenforceability of any provision of this Deed of Undertaking under the law of any jurisdiction shall not vitiate this Agreement whatsoever or affect its legality, validity or enforceability under the law of any other jurisdiction nor the legality, validity or enforceability of any other provision.

[109] Clause 7.2 of the DOU read:

> Clause 7.2 of DOU
>
> By extension of Clause 1.1, the Parties shall in good faith meet to make necessary amendments to any provisions found to be illegal, invalid or unenforceable referred to under Clause 1.1 so as to render the same legal, valid or enforceable, as though the same was part of this Deed of Undertaking and in substitution of the relevant provisions.

[110] Clause 15.1 of the MOD read:

> Clause 15.1 of MOD
>
> The illegality, invalidity or unenforceability of any provision of this MOD under the law of any jurisdiction shall not vitiate this Agreement whatsoever or otherwise affect its legality, validity or enforceability under the law of any other jurisdiction nor the legality, validity or enforceability of any other provision.

[111] Clause 10.3 of the MOD read:

> Clause 10.3 of MOD
>
> Not to challenge the Investor in any proceedings under any laws of Malaysia, whether or not it is a proceeding in respect of the Investor obtaining judgement on the sum due to it under the Agreement and/or this MOD or the proceedings for order for sale under the National Land Code 1965, of the Securitised Lands arising from the default by the Company and/or Depositor under the Agreement or MOD.

[112] These clauses raised further red flags with regard to the legitimacy of these transactions and are clearly admissions of the illegality of the SSA, the DOU and the MOD.

[113] The transaction was not saved by the First Schedule to the MLA 1951 and unenforceable under s. 15 of the MLA 1951.

[114] The unenforceability was further not cured by the inclusion of the anti-illegality clauses and could not insulate the transaction that was to be struck down as an illegal moneylending transaction.

[115] The inevitable result of all of this is that the interest charged renders the agreement void *ab initio* for being forbidden by law and would defeat the clear provisions of MLA 1951.

[116] It is further trite that the court will not lend its aid to that which is illegal in nature and therefore repugnant to public policy.

[117] The learned JC had erred in fact and law in failing to consider this aspect.

Did The Appellant(s) Admit Liability?

[118] The respondent had premised its case, *inter alia,* upon the allegation that the first appellant alleged default of its contractual obligations under the principal agreements were undisputed.

[119] This much was evident from the various affidavits and submissions filed by the respondent.

[120] The learned JC had also equated a failure to respond in writing to notices as an admission of breach.

[121] However, as pointed out by the appellants, the first appellant had explicitly disputed the alleged default in its response to the notice of arbitration dated 29 March 2023.

[122] Furthermore, discussions were ongoing between parties at the same time.

[123] Learned counsel for the appellants submitted, and we think, correctly, that non-response to a demand letter may be weighed against the overall evidence but failure to respond must not be equated to admission of a claim. (See *Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt* [2016] 9 CLJ 73).

[124] The learned JC had therefore erred in adopting the position that there was an admission by the first appellant.

Decision

[125] In all the circumstances, we find that the learned JC had failed to properly appreciate that the transaction which mandated an obligation to repay a sum of money at a higher rate with reference to a fixed time limit would tend towards the conclusion that it was for all intents and purposes an illegal moneylending arrangement which was void.

[126] The grant of the remedy of specific performance which was a discretionary remedy and one rooted in equity ought not to have been decreed in the face of a statutory provision and/or in respect of a transaction which was construed as illegal.

[127] For this reason and also all the other reasons given above, we find that there are good reasons for appellate intervention. We therefore allow the appeal with costs. We set aside the decision of the HCJ and all the consequential orders made. We award costs of RM80,000 to the appellants subject to allocatur.

[128] My learned brothers Justice Azhahari Kamal Ramli and Justice Muniandy Kannyappan have seen and approved the draft grounds of judgment.